

**VIDAL E. BARAJAS**  
Claimant

**BRETT ORTH CONSTRUCTION**  
Respondent

**TRAVELERS INDEMNITY COMPANY**  
Insurance Carrier

Claimant was injured on June 29, 2006, when he fell from a ladder while working as a roofer on a building at 2302 16th Street in Wichita, Kansas. Claimant had been contacted by a person, whom claimant identified only as "Gerardo", and hired to work on the job being contracted by respondent. Claimant acknowledged that he had no contact

with respondent, or its owner, Brett Orth, other than occasionally seeing Mr. Orth at the job site. Claimant was supervised and paid, in cash, by Gerardo.<sup>1</sup>

After the accident, claimant left work and remained home for about two weeks. He did eventually go to the Via Christi Regional Medical Center emergency room for treatment, but was unable to pay for the medical treatment and did not return to the emergency room. He then returned to work for Gerardo at a different location and worked for about three weeks.

Mr. Orth testified that he was familiar with Gerardo, having used him on occasion as a subcontractor on roofing jobs. Mr. Orth also testified that he had not hired claimant and had never seen him before the preliminary hearing. Mr. Orth stated that his subcontractors were required to have workers compensation insurance and he required proof of that fact in the form of certificates of insurance before they were used as subcontractors.

K.S.A. 44-503(g) states in part:

Notwithstanding any other provision of this section, in any case where the contractor **(1) is an employer who employs employees in an employment to which the act is applicable . . . and (2) has secured the payment of compensation as required by K.S.A. 44-532 . . .** then, the principal shall not be liable for any compensation under this or any other section of the workers compensation act for any person for which the contractor has secured the payment of compensation which the principal would otherwise be liable for under this section and such person shall have no right to file a claim against or otherwise proceed against the principal for compensation under this or any other section of the workers compensation act. In the event that the payment of compensation is not secured or is otherwise unavailable or in effect, then the principal shall be liable for the payment of compensation. (Emphasis added.)

The testimony of Mr. Orth that Hernandez (Gerardo) Ernesto had workers compensation insurance is uncontradicted in this record. There is no indication in this record that claimant made any attempt to contact or proceed in any manner against Hernandez Ernesto, even though the record indicates a possible address for this person.

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<sup>1</sup> A July 6, 2006 emergency room note from Via Christi Regional Medical Center indicates claimant's employer is Hernandez Ernesto. (See P.H. Trans., Resp. Ex. 1.) Brett Orth, respondent's owner, identified Hernandez Ernesto as being Gerardo, and also noted that Gerardo sometimes went by the nickname "Jerry". The emergency room record also included an address for Hernandez Ernesto.

Uncontradicted evidence, which is not improbable or unreasonable, may not be disregarded unless it is shown to be untrustworthy.<sup>2</sup>

K.S.A. 44-503(g) mandates that claimant pursue “Gerardo”, the contractor, for his workers compensation benefits. The legislature clearly intended a claimant pursue an insured contractor absent proof that the contractor’s insurance is unavailable or not in effect.

It is a fundamental rule of statutory construction, to which all other rules are subordinate, that the intent of the legislature governs if that intent can be ascertained.<sup>3</sup>

This Board Member reverses the Order of the ALJ and remands this matter back to the ALJ for further proceedings consistent with this Order.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.<sup>4</sup> Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2005 Supp. 44-551(b)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.

**WHEREFORE**, it is the finding, decision, and order of this Appeals Board Member that the Order of Administrative Law Judge Thomas Klein dated October 11, 2006, should be, and is hereby, reversed and remanded for further proceedings consistent with this Order.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of January, 2007.

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BOARD MEMBER

c: James R. Roth, Attorney for Claimant  
William L. Townsley, III, Attorney for Respondent and its Insurance Carrier

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<sup>2</sup> *Anderson v. Kinsley Sand & Gravel, Inc.*, 221 Kan. 191, 558 P.2d 146 (1976).

<sup>3</sup> *Matter of Marriage of Killman*, 264 Kan. 33, 955 P.2d 1228 (1998) (citing *City of Wichita v. 200 South Broadway*, 253 Kan. 434, 855 P.2d 956 [1993]).

<sup>4</sup> K.S.A. 44-534a.

**VIDAL E. BARAJAS**

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**DOCKET NO. 1,030,457**

Thomas Klein, Administrative Law Judge